

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	
)	
Request for Expedited Declaratory)	
Ruling Concerning the Territorial)	MB Docket No. 04-75
Exclusivity Rules, Section 73.658(b))	
of the Commission's Rules)	
)	

COMMENTS OF DESTINY LICENSES, LLC
IN SUPPORT OF PETITION FOR EXPEDITED DECLARATORY
RULING

Destiny Licenses, LLC ("Destiny"), licensee of television broadcast station KTGF, Great Falls, Montana, by its attorneys, hereby supports the *Request for Expedited Declaratory Ruling* ("Request") filed by Max Media of Montana LLC ("Max Media") on February 25, 2004.¹ On November 24, 2004, Destiny acquired KTGF from Max Media following Commission consent to the assignment of the license.² Max Media remains a party-in-interest in this matter by virtue of its reservation of rights in the Asset Purchase Agreement ("APA") with Destiny.³ Destiny is now an interested party by virtue of its status as the new licensee of KTGF and, at least until July 1, 2005, the NBC affiliate in Great Falls. Destiny seeks to retain the NBC affiliation in Great Falls.

¹ "Comment Sought on 'Request for Expedited Declaratory Ruling' Concerning the Territorial Exclusivity Rules (Section 73.658(b) of Commission's Rules)," DA-04-747 (released March 19, 2004).

² See Application for Commission Consent to the Assignment of License for KTGF, BALCT-20040901AAF, granted on October 22, 2004 (FCC Public Notice Report No. 45849, released October 27, 2004).

³ Section 2.2(k) of the APA excludes certain claims as assets in the transaction, "specifically including but not limited to claims related to the termination of the Affiliation Agreement and FCC proceedings involving Seller. . ." NBC consented to the assignment of KTGF's network affiliation to Destiny on October 19, 2004.

The record of this proceeding reveals two critical facts. First, there is evidence of an arrangement that appears to violate the Commission's limits on territorial exclusivity between Sunbelt Communications Company ("Sunbelt"), a television broadcast licensee, and NBC, a network organization.⁴ This arrangement is evident in the April 26, 1999 letter between NBC and Sunbelt describing Sunbelt's involvement in a deal which included NBC's termination of KTGF's NBC affiliation upon expiration of its current term in July, 2005.⁵ Second, there is no objective evidence—grounded in either market economics or affiliate performance—to rebut the logical presumption that NBC's decision not to renew KTGF's affiliation grew out of the arrangement with Sunbelt as described in the Letter. The record contains only naked and self-serving statements by NBC that its decision is the exercise of independent judgment.

Beyond the record of this proceeding, Destiny cannot find any objective, rational business explanation for NBC's decision not to renew KTGF's affiliation. Destiny reviewed the business records of KTGF during the course of its due diligence prior to consummation of the purchase. As stated in the attached Declaration of Darnell Washington, the President of Destiny, there was no "notice of default or other communication from NBC that would indicate any deficiency in performance by KTGF(TV) as an NBC network affiliate." The only allegation of default surfaced in the

⁴ Section 73.658(b) in pertinent part provides: "No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [. . .] which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization." 47. C.F.R. § 73.658(b).

⁵ Letter from John F. Damiano, then Senior Vice President for Affiliate Relations at NBC, to James E. Rogers, President of Sunbelt, dated April 26, 1999. ("Letter").

FCC filings after February 25, 2004, the date when Max Media informed the Commission of the illegal arrangement involving the NBC affiliation in Great Falls.

Simply put, if not for the arrangement between NBC and Sunbelt, there is no credible and convincing explanation for NBC's decision regarding the termination of KTGF as an affiliate. The facts weigh strongly against an inference of independent judgment because NBC did not make an isolated decision to terminate service to the Great Falls community. NBC made a simultaneous decision to expand the scope of the Helena affiliate's exclusivity into Great Falls—a clear violation of the territorial exclusivity rule. While Sunbelt and NBC likely would prefer this entire matter to disappear, and they may wish that the 1999 letter from NBC Television Network to James E. Rogers had never seen the light day, the Letter is now before the Commission, and the violation embedded in the arrangement described in the Letter must be addressed.


CONCLUSION

Destiny aspires to continue the history of strong local service by KTGF to Great Falls residents, but a network affiliation is an essential part of the economic foundation for such local service. If Destiny is not given the opportunity to negotiate the renewal of KTGF's affiliation with NBC because a station licensed to a distant community is to supplant KTGF's relationship with NBC by virtue of an illegal "confidential" arrangement in violation of Section 73.658(b) of the Commission's rules, irreparable harm to the public interest will result. A new minority owner of a local television station will be disadvantaged in the market; competition will be thwarted; and the community of Great Falls will lose the benefits of the strong local service now provided by KTGF.

Accordingly, Destiny respectfully requests expeditious action on the Request by the Commission before the current term of KTGF's affiliation agreement expires in July, 2005, and Destiny requests that the Commission issue a declaratory ruling that the arrangement violates Section 73.658(b) of the Commission's rules. Declaratory relief will serve the public interest and will facilitate negotiations between Destiny and NBC on a level playing field that enables NBC to consider the compelling economics of continuing the affiliation with KTGF under its new minority ownership structure.

Respectfully submitted,

DESTINY LICENSES, LLC

By: 

Erwin G. Krasnow, Esq.
Garvey Schubert Barer
1000 Potomac Street, NW
Fifth Floor
Washington, DC 20007
(202) 298-2161
Its Attorneys

Dated: March 21, 2005



March 11, 2005

Mr. Darnell Washington
President
Destiny Communications, LLC
18 Huntington Ave.
Wichita, KS 67206

JOHN F. DAMIANO
Executive Vice President
Affiliate Relations, TV Network

30 Rockefeller Plaza
New York, NY 10112
212 664 4327 tel
212 664 2700 fax
john.damiano@nbcuni.com

Dear Darnell:

I am in receipt of your letter dated March 3, 2005 regarding our meeting and your continued interest in continuing the affiliation with NBC.

As we discussed at our meeting, NBC does not intend to renew KTGF's affiliation. NBC made the decision not to renew the affiliation agreement with KTGF well in advance of Destiny's involvement with KTGF. The previous owners, Max Media, were given formal notice of cancellation and non-renewal on May 3, 2004. Upon termination of the contract, as is the case in any market, NBC has the option to determine which station, if any, will be offered the NBC affiliation.

The fact that NBC was not going to renew KTGF was made clear to Max Media in our May, 2004 letter. Destiny Communications was made aware of NBC's decision during the diligence process in connection with the purchase of KTGF. John Trinder, President and COO of Max Media also specifically stated in a letter to NBC dated October 4, 2004 that "A copy of the KTGF-TV NBC affiliation agreement plus your letter of May 3, 2004 were exhibits to the contract signed by Destiny related to acquiring KTGF-TV. Darnell is aware that the current affiliation agreement terminates on July 1, 2005".

When you called me earlier in the year asking to meet with us, I reiterated our position, and did so once again during our discussion in New York. I shared with you that we had made this decision long before you purchased KTGF. Destiny has repeatedly been apprised that NBC is moving in a different direction at the termination of the affiliation agreement, something every station and its network have a right to do when a contract expires.

In the event that we decide to affiliate elsewhere in the Great Falls DMA, we will be happy to contact you if you wish. Again, I would like to wish you every success with KTGF and your future investments in the television business.

Very truly yours,

NBC UNIVERSAL, INC.

By:

Name: JOHN F. DAMIANO

Title: Executive Vice President
Affiliate Relations, TV Network

DECLARATION OF DARNELL WASHINGTON

Under penalty of perjury, I, Darnell Washington, hereby declare that:

1. I am the President of Destiny Licenses, LLC and its parent, Destiny Communications, LLC (“Destiny”). I have personal knowledge of the following facts, except where noted.
2. Destiny acquired KTGF(TV), Great Falls Montana from MMM License II LLC on November 24, 2004. Prior to consummation of the Asset Purchase Agreement for KTGF(TV), I conducted a due diligence review of the business operation of KTGF(TV) and the business relationships Destiny would acquire.
3. During the conduct of this due diligence, among other things, I reviewed the network affiliation agreement between MMM License II LLC and NBC, dated April 5, 1996, as amended (“Affiliation Agreement”). According to the terms of the Affiliation Agreement, it is scheduled to expire on July 1, 2005. In addition to reviewing the Affiliation Agreement, I reviewed the station’s records and documents for all information related to the performance of KTGF(TV) as an NBC affiliate during MMM License II LLC’s ownership. I did not discover any notice of default or other communication from NBC that would indicate any deficiency in performance by KTGF(TV) as an NBC network affiliate. The only allegation of default involved conduct occurring after February 25, 2004, the date when Max Media informed the Federal Communications Commission (“FCC”) of an illegal arrangement involving NBC.

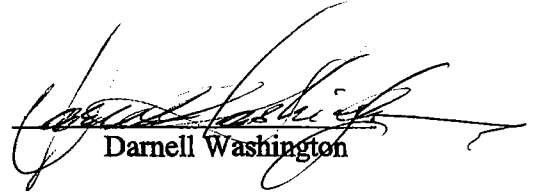
4. In fact, in all of my due diligence surrounding the operations and activities of KTGF(TV), I found nothing indicated that NBC has cause to terminate its affiliation agreement with KTGF.

5. My due diligence also included a review of the Request for Expedited Declaratory Relief filed with the FCC by Max Media of Montana LLC on February 25, 2004. I am aware of the arrangement between Sunbelt Communications Company (Sunbelt”) and NBC, described in a letter from John F. Damiano, then Senior Vice President for Affiliate Relations at NBC, to James E. Rogers, President of Sunbelt, dated April 26, 1999.

6. On its face, the April 26, 1999 letter describes an unlawful arrangement in which Sunbelt acquired network affiliations with NBC by promising future expanded service to Great Falls in exchange for NBC’s promise not to renew the existing network affiliation agreement with KTGF. By the very terms of the April 26, 1999 letter, this arrangement was to remain “confidential.” There is no other explanation for KTGF’s termination as a n NBC affiliate in the FCC’s records.

7. Destiny formally has sought the renewal of KTGF’s network affiliation agreement with NBC, but NBC has refused (see attached correspondence). Apparently, NBC is indifferent to the merits of KTGF’s strong position in the local Great Falls market and has not placed much value on new minority ownership within the ranks of NBC affiliates. In sum, my due diligence found no legitimate justification for NBC’s indifference to these important business considerations, other than its preexisting obligations to Sunbelt as revealed in the April 26, 1999 letter.

I declare under penalty of perjury that the foregoing is true and correct. Executed
on March 17, 2005.



Darnell Washington

DC_DOCS:635973.1

CERTIFICATE OF SERVICE

I, Anne Rutherford, do hereby certify that on this 21st day of March, 2005 a copy of the foregoing "Comments of Destiny Licenses, LLC in Support of Request for Expedited Declaratory Ruling" was served by first class United State mail, postage prepaid, addressed to:

Thomas J. Hutton, Esq.
Uhlmann/Latshaw Broadcasting LLC
5823 Potomac Avenue, N.W.
Washington, DC 20016-2517

F. William LeBeau, Esq.
National Broadcasting Company, Inc.
1299 Pennsylvania Avenue, N.W., Suite 1100
Washington, DC 20004-1109

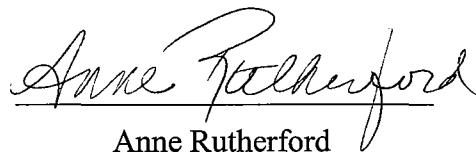
Mr. John F. Damiano
Senior Vice President – Affiliate Relations
NBC Television Network
30 Rockefeller Plaza
New York, NY 10112

Kevin F. Reed, Esq.
Kevin P. Latek, Esq.
Dow, Lohnes & Albertson, PLLC
2300 New Hampshire Avenue, N.W., Suite 800
Washington, DC 20036-6802

Julian L. Shepard, Esq.
William Mullen, Esq.
A Professional Corporation
1666 K Street, N.W., Suite 1200
Washington, D.C. 20006-1200

Alan C. Campbell, Esq.
Jason S. Roberts, Esq.
Irwin Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W., Suite 200
Washington, DC 20036

J. Dominic Monahan, Esq.
Ulvass, Cobb, Richards & Fraser, PC
777 High Street, Suite 300
P. O. Box 10747
Eugene, OR 97440-2747


Anne Rutherford